NORDIN HAMID & CO

v.

EMCO PROPERTIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[CIVIL APPEAL NO: R1-12-144-94]
26 SEPTEMBER 1998

CONTRACT: *Entire contract - Solicitor & housing developer - Contract between developer and solicitor to handle sale & purchase agreements of houses - Whether contract severable - Whether contract was for all units within housing project - Whether developer breached contract - Whether solicitor could only claim on a quantum meruit - Whether solicitor breached s. 84 of Legal Profession Act 1976 - Costs follow the event*

The appellant solicitors were appointed by the respondent developer to handle all the sale and purchase agreements of its purchasers in respect of a housing project. It was agreed that the appellant's fees would be paid by the respondent based on the purchase prices of the houses, *ie*, RM400 for each unit above RM169,500, RM350 for each unit between RM145,001 and RM169,500, and RM300 for each unit costing RM145,000 or less. However, of the 489 units to be sold, the appellant was only given 270 to handle. The appellant therefore alleged that the respondent had breached the contract between them and demanded the sum of RM76,650 being RM350 for each of the 219 remaining units. The sessions judge held that the contract was severable and that the appellant could only claim on a quantum meruit. The appellant appealed.

Held:

[1] The appointment of the appellant was for services to be rendered in respect of all the 489 units of houses. Although the appellant called for the payment of its fees from time to time as the sale and purchase agreements were being completed, this did not turn the contract into a severable one. The contract was an 'entire contract' and the respondent had breached it.

[2] There was no evidence that the appellant had breached s. 84 of the Legal Profession Act 1976; even if did, the consequence would merely be disciplinary in nature and would not have rendered the contract void or unenforceable.

[Appeal allowed with costs.]

Legislation referred to:
Contracts Act 1950, s. 66
Legal Profession Act 1976, s. 84

For the appellant - Ng Choong Meng; M/s Ng Choong & Co
For the respondent - Conrad Young; M/s Azman, Davidson & Co

Reported by Alex KC Lee

JUDGMENT

Abdul Kadir Sulaiman J:

Under a privatization arrangement, the respondent, a housing developer entered into a joint venture agreement with the Selangor State Development Corporation (hereinafter referred to as "the Corporation"), for the respondent to develop the Corporation's land into a housing estate known as Wangsa Baiduri Town Houses. The appellant, a firm of solicitors, was appointed by the joint venture partners to act only for them in the preparation of hire purchase agreements with the potential purchasers of the houses to be built on the land and other related conveyancing matters. All fees for payment to the appellant in relation with the services rendered were to be paid by the respondent. The respondent agreed to pay the legal fees to the appellant at the rate based on the purchase price of each unit of the houses to be sold. The rate for the purchase price of RM145,000 and below was RM300, for those above RM145,000 to RM169,500 the rate was RM350, and for those above RM169,500 the fee was RM400. The total units of houses involved were 489 made up of 150 units of town houses of 2½ storey high and 339 units of town houses of two storey high. The appellant accepted the offer. The appellant conducted the sale and purchase agreements for 270 units only but the remaining 219 units were believed to have been given by the respondent to other solicitors for the service. By a letter dated 12 August 1988 the appellant demanded from the respondent a sum of RM76,650 at RM350 per unit being payment for the sale and purchase agreements of the said 219 units alleging that the respondent has breached the agreement between them by not getting the service of the appellant as agreed.

In the meanwhile, by Summons No. 62-1555-88 of 25 April 1988 and subsequently amended on 22 July 1991, the appellant sued the respondent in the Sessions Court for RM27,400 being balance of professional legal fees for services rendered to the respondent at its request together with 8% interest per annum on the sum of RM22,500 from 8 May 1987 until realization, on the sum of RM2,150 from 4 January 1988 until realization and on the sum of RM2,750 from 9 January 1988 until realization, and costs in respect of the 270 units rendered. Then on 12 September 1988 by Summons No. 62-3284-

88 the appellant sued the respondent in the Sessions Court for RM76,650 with 8% interest and costs being payment for the sale and purchase agreements for the outstanding 219 units alleged to have been given by the respondent to other solicitors for the service agreed to be performed by the appellant.

The amended defence of the respondent in respect of the claim in Summons No. 62-1555-88 is a denial of the said claim and that in the alternative, the appellant if so acting was acting in breach of s. 84 of the Legal Profession Act 1976. Consequently, the agreement is void and unenforceable as the respondent acted for both the respondent as a housing developer and the purchasers. The defence of the respondent in Summons No. 62-3284-88 was also a denial of the claim by the appellant averring that the appellant does not have monopoly of conducting the sale and purchase agreements for all the 489 units thereby refuting the allegation of any breach on the part of the respondent. The respondent contends that the appellant has no right to claim for work which it did not perform. In the alternative, the respondent had also acted in breach of s. 84 of the Legal Profession Act 1976 thereby rendering the agreement between them void and unenforceable. Subsequently, these two cases were consolidated and a hearing of the actions were held in the Sessions Court.

Agreed facts between the appellant and the respondent were tendered before the court in respect of the two actions consolidated. A copy is to be found at p. 45 of the record of appeal (vol. 1). *Inter alia*, it was agreed that the appellant had so far conducted the sale and purchase agreements and other conveyancing matters for 270 units out of the 489 units which had been allocated to the appellant. The professional fee to be paid by the respondent to the appellant in respect of the 270 units is RM27,400 after contra of accounts between them. The remaining 219 units were subsequently handled by another solicitor or other solicitors, the professional fees representing damages for alleged breach of contract by the respondent in respect of this remaining number of units is RM76,650 as claimed.

Facts Of Contention For The Respondent

1. The contract with the appellant is not entire but severable and divisible;
2. The appellant acted in breach of s. 84 of the 1976 Act and the contract is therefore, void and unenforceable.
3. The appellant is only entitled to be compensated for work actually done pursuant to s. 66 of the Contracts Act 1950.

Facts Of Contention For The Appellant

1. The contract is entire for the whole project of 489 units.
2. Appellant not acting for purchasers but exclusively for the respondent.
3. Appellant does not admit to be in breach of s. 84 of the 1976 Act. Even so, the respondent is not entitled to treat the contract as void.

On 8 December 1992 the respondent paid into court a sum of RM43,339.19 in respect of both the actions of the appellant.

PW1 in his evidence before the learned judge in the court below testified that to his knowledge, the said 219 units had been sold by the respondent but the appellant was not asked to complete the process of sale and purchase. Hence the claim for the breach. It was denied that the appellant acted for both the developer and the purchasers. PW2 was the ex-executive director of the respondent from March 1985 to February 1987. It is his evidence for the appellant that the appellant was appointed to service the entire units of houses in Wangsa Baiduri Phase 1 consisting of 487 units of townhouse. It was a package deal. The appellant performed the service for some of the units but later it was given to another firm of solicitors as to the balance. The respondent did not call any witness before the learned judge. At the end of it, on 25 April 1994, the learned judge held that the contract with the appellant is divisible and not entire and as such the appellant was entitled only to claim on quantum meruit. Consequently she allowed the claim of the appellant to the extent of RM27,400 in respect of work done which means to say that she allowed the amount claimed in Summons No. 62-1555-88 in respect of the 270 units. She however dismissed the claim of the appellant in Summons No. 62-3284-88. As the sum of RM43,339.19 was deposited by the respondent into court in respect of both the actions, the appellant was only awarded costs before the payment into court by the respondent but for costs after the payment into court was being awarded to the respondent. As for interest over the sum of RM27,400 in favour of the appellant, she awarded interest at 8% per annum from the date of payment of the money into court until realization. In her grounds of decision of 6 June 1994 the learned judge made no mention at all relating to the issue of s. 84 of the 1976 Act which concerns the appellant as the advocate and solicitor acting for the respondent as a developer and the purchasers in the housing development.

The appellant was unhappy with the said decision of the learned judge and filed this appeal against the award of costs in respect of Summons No. 62-1555-88 and the dismissal with costs in respect of Summons No. 62-3284-88. Before touching on the issue of costs, I will first deal with the issue of the nature of the contract for service existing between the appellant and the

respondent *ie*, whether it was an entire contract or a non-entire contract. By a letter dated 19th April 1986, the Corporation, the joint venture partner of the respondent, wrote to the appellant as follows:

> Tuan,
>
> Perlantikkan Peguam Bagi Projek Penswastaan PKNS/EMKO Properties Sdn. Bhd. di Lot 3067, Mukim Damansara.
>
> Jenis: 150 Unit Rumah Bandar 2 ½ Tingkat
> 339 Unit Rumah Bandar 2 Tingkat
>
> Harga: $169,500.00 seunit (2½ Tingkat)
> $145,000.00 seunit (2 Tingkat)
>
> ---
>
> Berhubung dengan perkara di atas, sukacita dimaklumkan bahawa **Perbadanan telah bersetuju melantik firma tuan bagi menguruskan kerja-kerja guaman untuk projek-projek Perbadanan yang diswastakan**. Dalam perkara ini firma tuan adalah diarah bertindak bagi pihak Perbadanan dan Syarikat di atas sahaja.
>
> Perlu diingat, pihak tuan hendaklah memerhatikan kepentingan Perbadanan dan Syarikat sentiasa diutamakan dan terpelihara. Segala bentuk bayaran yang akan terlibat sewaktu menguruskan kerja-kerja tersebut hendaklah dituntut terus dari Syarikat berkenaan.
>
> Pihak tuan akan dijemput menghadiri perbincangan berhubung dengan tugas ini bersama pihak Syarikat dan Perbadanan dalam sedikit masa lagi.
>
> Sekian, terima kasih. (emphasis added).

By a letter dated 15 April 1986, the respondent wrote to the appellant as follows:

> Dear Sirs,
>
> **RE: PANEL OF SOLICITORS**
>
> We are pleased to inform you that Perbadanan Kemajuan Negeri Selangor has agreed to our nomination for your legal firm to act on their and our behalf in handling the Sale and Purchase Agreement and other related conveyancing matters **in respect of our Wangsa Baiduri Townhouses in Petaling Jaya**. Perbadanan will be writing to you too in due course.
>
> Meanwhile, we look forward to your continued support and prompt services at all times from you. (emphasis added).

By letters dated 5 May 1986 and 7 May 1986 the respondent agreed to pay the appellant the following as solicitors fees for the purpose:

1. Purchase Price $145,000 and below	$300
2. Purchase Price above $145,000 to $169,500	$350
3. Purchase Price above $169,500	$400

From the correspondence mentioned, it is clear that the employment of the appellant was for the work to be done on the 489 units comprised in the Wangsa Baiduri Town House project on the scale of fees as specified. Though the appellant called for payment of his fees from time to time as the work in respect of the respective sale and purchase agreements completed, it does not turn the contract into a severable one. The contract agreed upon was on a package deal in respect of the whole units in the housing project. However, instead of allowing the appellant to carry on with its part of the bargain, the appellant was allowed only in respect of 270 units out of the 489 units which had been allocated to it by the agreement. It is my view, therefore, that the contract was one which is entire and not severable as so found by the learned judge and for the failure on the part of the respondent to allow the appellant to complete would render the respondent to be in breach of the contract the quantum of which is RM76,650 as agreed by the parties in the statement of agreed facts. In the circumstances, the question of payment on quantum meruit would not at all arise. As to the issue of s. 84 of the 1976 Act, my view upon the reading of the section is that even if the appellant had contravened the said section, it would not render the contract void or unenforceable as according to sub-s. (6) thereof the consequence upon the contravention is merely one of a disciplinary nature. In any event there is no evidence in the present case of the contravention by the appellant of the said provisions of the said section. Under the circumstances, the learned judge was wrong in dismissing the claim of the appellant in Summons No. 62-3284-88.

On the issue of costs, it was submitted before me that the payment into court was made by the respondent on the basis that it was a settlement in respect of both suits. Since that was not accepted and the respondent was found to be liable in respect of Summons No. 62-1555-88, the costs should follow the event. Whatever is the argument in the light that the result of this appeal is that the appellant also succeeds in its claim in Summons No. 62-3284-88, the costs of the proceedings should follow the event. In the circumstances, I would allow the appeal of the appellant and reverse the decision of the learned judge and substitute therewith by a judgment in favour of the appellant in respect of both the suits as per its claim with costs to the appellant.

Appeal allowed with costs.